



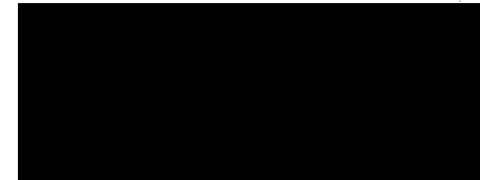
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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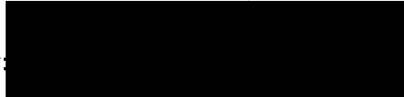


File: WAC 01 099 53259 Office: CALIFORNIA SERVICE CENTER

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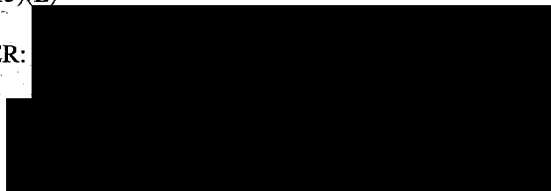
FEB 26 2003

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act,
8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myn L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a courier service. The petitioner seeks to employ the beneficiary temporarily in the United States in the capacity of a manager or executive, namely as its vice president. The director determined that the petitioner had not established that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

On appeal, counsel presents a brief and additional evidence.

To establish L-1 eligibility under Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. § 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be addressed in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The Form I-129, Petition for a Nonimmigrant Worker was filed on February 6, 2001. The petitioner was incorporated in the State of California on January 10, 2000.

The foreign entity indicates that it employs two individuals, one since June 1, 1998, who is responsible for administrative tasks and customer service, and the other (the beneficiary) since May 1, 1997, who is the manager of the company, and is responsible for "purchases and sales, customer service, etc...." The foreign entity indicates that it is:

Dedicated to importation, distribution, great and minor sale of Japanese coatings for wall and fronts, being importers and distributors exclusively for all the Republic of Argentina; as well as the commercialization of floating wood floors, curtains, etc..

The petitioner also states that the foreign entity employs ten "independent contractors." No evidence of this assertion is included in the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner states that the beneficiary has been employed by the foreign entity since 1997 in the position of "Manager." The petitioner also indicates the beneficiary's duties for the foreign entity.

The petitioner stated that the beneficiary also acted as a troubleshooter, maintaining currency with daily operations and providing contributions in the areas of marketing, sales, promotions, logistics, and distribution. The petitioner stated that the beneficiary's ideas and planning are communicated to the petitioner and then executed.

The petitioner stated that it would pose a "financial risk" if the beneficiary were not permitted to come to the United States to run the operation as its vice president. The petitioner also stated that due to the company's growth, it now is a business necessity to rely on the beneficiary's marketing and sales expertise "...to take the company to a higher level of operation." The petitioner also stated that the beneficiary's

transfer would permit the president of the company to perform his own duties.

In a translated letter dated November 29, 2000, the foreign entity states that beneficiary will assume the position of vice president for the petitioner in Los Angeles. The foreign entity's representatives stated the duties of the position to be:

The specified position implies the verification of jobs done, as well as the development, pursuit, execution and attention with the greater care and diligence of all the tasks of this position.

In response to a request for additional evidence, the petitioner indicated the beneficiary's duties in the United States to include: developing and expanding the sales market with an aggressive sales plan; developing and establishing the petitioner; and, studying the competitors' strategies.

The petitioner stated that the beneficiary would spend his time performing the following duties:

- Development/establishment of U.S. entity 25%
- Market services 20%
- Sales planning 40%
- Studying competitor's strategies (marketing) 15%

In another submission, the petitioner stated that the duties of the vice president would differ from that of the president, and indicated the duties to be:

- direct and coordinate the activities of the sales department and the business organization;
- aid the president in formulating and administering organizational policies;
- develop long range goals and objectives, while the president reviews the activity and financial reports to determine the progress and status in attaining objectives;
- revise objectives and plans in accordance with current conditions;
- review and analyze activities, costs, operations;
- forecast data to determine department or division progress toward stated goals and objectives;
- confer with the president to review achievements and discuss required changes in goals or objectives resulting from current status and conditions.

The petitioner added that that the beneficiary also will identify and negotiate contracts with "major entities," and have the

capacity to hire additional staff, as necessary.

On appeal, counsel asserts that the petitioner does require the services of an executive. Counsel states that the designation of the time to be spent by the beneficiary in each area of work is very significant and confirms that 100 percent of the beneficiary's time will be spent on executive and managerial duties. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1990).

Counsel states that the beneficiary will focus his executive efforts to further develop the operations of the U.S. entity, and to significantly contribute to the strategic placement and progress of the petitioner in a very competitive industry. Here, counsel indicates the duties of the position as:

- direct business operations and establish policy/plan-implementation, with particular focus and concentration on the management of the marketing department of the Petitioner;
- devise plans and strategies, establish policies and goals, and steer the company's marketing towards more growth and expansion;
- exercise wide latitude in discretionary decision-making; and,
- bear primary accountability for the sales and marketing achievements of the company, and for establishing goals and policies that best serve the company's interests.

Counsel states that the director erroneously assumed that the duties listed were day-to-day operational functions. Counsel asserts that the beneficiary will be involved in executive policy-making and business plan setting for marketing and sales and not the daily activities. Counsel states that this is the essence of expansion in a competitive industry, especially where a company has been growing and is attempting to further expand, as in the petitioner's case.

Counsel states that the beneficiary will not be performing any functions that will overlap with the duties of the president, but that the beneficiary's position will support the president's administrative and general operational functions. Interestingly, counsel also states that there will be no subordinate relationship between the president and the beneficiary in his role as vice president, but that the beneficiary will exercise independent discretion and will make executive decisions pertaining to marketing, expansion, and sales.

In another submission, however, counsel indicates that the beneficiary will assess the company's marketing and sales needs, devise plans to meet those needs in terms of market expansion and

revenue growth, and direct the marketing to increase profits. Counsel states that the beneficiary then will share his assessments with the president of the company, and the president will take the administrative steps necessary to put the beneficiary's recommendations into place.

On appeal, counsel includes the petitioner's business plan and states the petitioner's "immediate" and "short-term plan" is focused primarily upon market expansion. The business plan indicates that the petitioner will: seek entry into new geographic markets; establish new and/or revised services within the courier service industry; increase the market share in those areas already served; procure and implement new and high-tech devices and equipment to follow current industry standards and to accommodate expansion; establish, maintain and refine a website; procure resources and hire employees for website and technical growth; and, organize and promote the business by providing uniforms for messengers and creating an efficient customized ticketing system.

Counsel states that these steps "are absolutely essential...[and] are initiated within a comprehensive and broad marketing plan to promote and increase sales..." and will require the expertise of the beneficiary.

In response to a request for additional evidence, counsel lists the petitioner's employees and indicates that the petitioner currently employs a total of five individuals: the president, an "administrative" individual, and three drivers. All are indicated as having commenced employment with the petitioner no later than August 2000. Counsel states that most of the employees are "on commission" except for one salaried employee. No additional evidence of these assertions is included in the record.

On appeal, counsel asserts that the petitioner has expanded its customer base throughout the county of Los Angeles and is beginning to expand to other counties. Counsel states that although the petitioner has grown considerably thus far, it still requires the beneficiary's executive leadership to direct marketing and the expansion necessary to hire more workers and to increase profits. Counsel submits four of the petitioner's 2001 bank statements, indicating an average bank balance between \$912.59 and \$4,323.83 per month. Throughout the record, counsel and the petitioner allude to the growth that the petitioner has experienced since its incorporation, yet provides no evidence of these assertions.

The petitioner has provided insufficient evidence to demonstrate that the beneficiary's duties will be primarily managerial or executive in nature. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the function is not directly

performed by the manager or executive. The petitioner has not established that the beneficiary functions at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record, as currently constituted, does not support a finding that a qualifying relationship exists between the petitioner and the foreign entity. While the petitioner asserts that each of the foreign entity's three partners invested an equal amount of money in the petitioner, the record fails to support this finding. In addition, the petitioner's stock ownership, evidence of the purchase of this stock, and the total number of authorized shares or distribution of stock has not been established. The petitioner also has not established that the foreign entity supported a managerial or executive position. Finally, while numerous references are made to the \$956,000.00 that the foreign entity holds and the \$30,000.00 invested in the petitioner, with an expected infusion of \$50,000.00 more, evidence of these assertions is insufficient. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met.

ORDER: The appeal is dismissed.